

1 STEVEN J. COLOGNE, ESQ. (Bar No. 118534)  
2 MICHAEL R. GIBSON, ESQ. (Bar No. 199272)  
3 HIGGS, FLETCHER & MACK LLP  
4 401 West "A" Street, Suite 2600  
5 San Diego, CA 92101-7913  
6 TEL: 619.236.1551  
7 FAX: 619.696.1410

8 Attorneys for Defendants  
9 SAN DIEGO UNIFIED SCHOOL DISTRICT and  
10 JAMES GOOD

11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**UNITED STATES DISTRICT COURT**  
**FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

KAYLA CASHMAN BY AND THROUGH  
HER GUARDIAN AD LITEM,  
BERNADETTE HILGEMAN; AND  
STEPHEN CASHMAN, AN INDIVIDUAL,

Plaintiffs,

v.

SAN DIEGO UNIFIED SCHOOL  
DISTRICT; JAMES GOOD,  
INDIVIDUALLY; JESUS MONTANA,  
INDIVIDUALLY; and DOES 1 through 20,

Defendants.

CASE NO. 08 CV 0519-BEN (POR)

**DEFENDANTS' REPLY IN SUPPORT OF  
MOTION TO DISMISS PURSUANT TO  
F.R.C.P. 12(b)(1), (6)**

[F.R.C.P. 12(b)(1),(6)]

**DATE:** August 25, 2008  
**TIME:** 10:30 a.m.  
**COURTROOM:** 3  
**JUDGE:** Hon. Roger T. Benitez

1 Defendants SAN DIEGO UNIFIED SCHOOL DISTRICT (the “District”) and  
 2 JAMES GOOD (“Mr. Good,” and collectively with the District, the “Defendants”) hereby  
 3 respectfully submit the following reply memorandum in support of their motion to dismiss  
 4 Plaintiffs KAYLA CASHMAN’s (“Ms. Cashman”) and STEPHEN CASHMAN’s  
 5 (“Mr. Cashman,” and collectively with Ms. Cashman, the “Plaintiffs”) first amended complaint  
 6 pursuant to Federal Rules of Civil Procedure (“F.R.C.P.”) 12(b)(1) and (6).

7 **I.**

8 **INTRODUCTION**

9 As of the filing of the Defendants’ motion to dismiss, Officer Jesus Montana had not been  
 10 served with the Plaintiffs’ complaint. Accordingly, the Defendants’ failure to include Officer  
 11 Montana in their motion to dismiss does nothing to defeat their motion or impart jurisdiction of  
 12 the Plaintiffs’ claims upon this Court. Moreover, despite the Plaintiffs’ efforts to spin their bold  
 13 and conclusory allegations that constitutional rights were violated to support a finding of  
 14 jurisdiction before this Court, the Defendants are immune from alleged violations of 42 U.S.C.  
 15 section 1983 (“Section 1983”). Moreover, sufficient facts in support of Ms. Cashman’s Section  
 16 1983 claims have not been pled. This leaves only the Plaintiffs’ state law claims (over which this  
 17 Court has no jurisdiction). In accordance, this Court does not have subject matter jurisdiction  
 18 over this dispute, and the entire complaint must be dismissed without leave to amend.

19 **II.**

20 **OFFICER MONTANA HAS NOT BEEN SERVED**  
 21 **WITH THE PLAINTIFFS’ COMPLAINT**

22 According to the Court’s Docket and filings by the Plaintiffs, Officer Montana had not  
 23 been served with the Plaintiffs’ complaint as of the date the Defendants’ motion to dismiss was  
 24 filed. [Exhibit “B.”] As a consequence, there is no obligation on the Defendants’ part to litigate  
 25 this dispute on his behalf, nor does the exclusion of Officer Montana from the motion support a  
 26 ruling in the Plaintiffs’ favor. Accordingly, contentions that the Defendants’ motion to dismiss  
 27 must be denied based upon the failure to include Officer Montana in the motion are flat wrong.

28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
III.**THE DISTRICT MUST BE DISMISSED FROM THIS CASE IMMEDIATELY**

As noted in the Defendants' moving papers, and acknowledged by the Plaintiffs' opposition, the District is immune from Ms. Cashman's Section 1983 claims and recovery is not sought from it under the Section 1983 claims. [Opposition at p. 7, ll. 17-22.] Accordingly, at a minimum, the District should be summarily dismissed from the first and second causes of action.

Moreover, in the absence of federal question jurisdiction over the District, the District must be dismissed from the entire complaint based upon a lack of diversity between it and the Plaintiffs. [Complaint at ¶4—The District is subject to the California Government Code.] Where federal law claims are eliminated, the Court should decline to exercise jurisdiction over the remaining state law claims. *Acri v. Varian Associates, Inc.* (9<sup>th</sup> Cir. 1997) 114 F.3d 999, 1001. The Plaintiffs cannot cite any authority to the contrary. Accordingly, the District is entitled to be dismissed from this case outright.

## IV.

**MS. CASHMAN'S SECTION 1983 CLAIMS AGAINST MR. GOOD FAIL**

Turning to Mr. Good, even if Ms. Cashman's allegations are accepted as true (which the Defendants strenuously dispute), the facts pled do not pierce Mr. Good's immunity nor are they sufficient to sustain a cause of action under Section 1983.

A. ***Mr. Good is Immune.***

Ms. Cashman's claims against Mr. Good fail as a matter of law pursuant to Government Code section 820.2.

Government Code section 820.2 states:

Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused.

Government Code section 820.2 restates pre-existing California law and codifies it "to ensure that, unless otherwise provided by statute, public employees will continue to remain

1 immune from liability for their discretionary acts within the scope of their employment."

2 Legislative Committee Comment to Government Code section 820.2. As the California Supreme  
3 Court explained in *Caldwell v. Montoya* (1995) 10 Cal.4th 972:

4 The common law of California long provided that a governmental  
5 official has personal immunity from lawsuits challenging his or her  
6 discretionary acts within the scope of authority. [Citations.] This  
7 common law immunity was said to extend to all executive public  
8 officers when performing within the scope of their power acts  
which require the exercise of discretion or judgment. [Citations.]  
This immunity was absolute, and it protected an official  
notwithstanding malice or other sinister motive.

9 *Id.* at 979 (internal citations and quotations omitted).

10 Government Code section 820.2 renders Mr. Good immune in this case. Mr. Good is a  
11 public employee. [Complaint at ¶4.] Gov. Code section 811.2; Gov. Code section 811.4. Due to  
12 his status as a public employee, he is immune from liability for injury "resulting from his act or  
13 omission where the act or omission was the result of the exercise of the discretion vested in him,  
14 whether or not such discretion be abused." Gov. Code section 820.2.

15 **B. Allegations Against Mr. Good Do Not Support A Section 1983 Claim.**

16 The complaint alleges only discretionary conduct. School officials are entrusted with the  
17 authority and discretion to make assessments by balancing the risks and advantages of each  
18 course of conduct. *See, Nicole M. v. Martinez Unified Sch. Dist.*, (N.D. Cal. 1997) 964 F.Supp.  
19 1369, 1389 (superseded by statute). These assessments require evaluations, choices and judgment  
20 calls that are inherent in the exercise of discretion. Such assessments, evaluations, choices and  
21 judgment calls are shielded from liability by the discretionary immunity clause under  
22 Government Code section 820.2.

23 School officials must make discretionary decisions continuously throughout the course of  
24 the school day. Discretionary immunity protects such decisions. As pled in the Plaintiffs'  
25 complaint, Mr. Good allegedly questioned Ms. Cashman after it was learned she allegedly stole  
26 and damaged District property. Even though Mr. Good does not require reasonable suspicion to  
27 question Ms. Cashman<sup>1</sup>, such facts clearly provide the requisite probable cause to question her.

---

28 <sup>1</sup> The broad authority of school administrators over student behavior and student safety requires that school officials  
have the power to stop a minor student to ask questions or conduct an investigation even in the absence of reasonable

1 Such action is within Mr. Good's discretion.

2 Education Code section 48900 outlines several actions which may subject a student to  
3 discipline, including:

4 (f) Caused or attempted to cause damage to school property or private  
5 property;

6 (g) Stolen or attempted to steal school property or private property; . . .

7 Educ. Code §48900(f), (g).

8 Moreover, the parent or guardian of a minor who damages school property is liable for all  
9 damages caused by the student, up to \$10,000. Educ. Code §48904(a).

10 As set forth in the complaint, Ms. Cashman allegedly committed a criminal offense by  
11 improperly taking, driving and crashing a golf cart owned by the District. [Complaint at ¶¶9-15.]  
12 In other words, she allegedly attempted to steal school property, and in the process caused  
13 damage to it. Not only does such actions subject Ms. Cashman to discipline, at a minimum they  
14 permit the District and its employees to question her about the events.

15 In response to Ms. Cashman's reckless behavior, Mr. Good purportedly questioned  
16 Ms. Cashman (but did not search or seize her) and asked her father to pay for the damage caused  
17 to the golf cart since he is liable for the damage under Education Code section 48904(a).

18 [Complaint at ¶¶13-14.] These actions are protected and, in fact, authorized by California law.  
19 Further, there is no allegation that Mr. Good illegally obtained evidence or other information as a  
20 result of the allegedly unlawful "search and seizure." While Ms. Cashman acknowledges the  
21 District's and Mr. Good's authority to question students at school,<sup>2</sup> she fails to plead how  
22 Mr. Good's alleged questioning disregarded her Fourth Amendment protections. Where was the  
23 threat of force? [Complaint at ¶18.] Who filed a false report? [Complaint at ¶19.] Rather than  
24 answer these questions with facts, she simply concludes (incorrectly) that her protections were  
25 violated.

26 Further, she is wrong in contending the Defendants arrested or prosecuted her; such roles

---

27 suspicion. *In re Randy G.* (2001) 26 Cal.4<sup>th</sup> 556, 563-564.

28 <sup>2</sup> Opposition at p. 8, ll. 14-15; p. 9, fn. 1 ("Good's actions were . . . within his authority of a Vice Principal").

1 are served by police officers and prosecutors, not the Defendants. [Opposition at p. 8, ll. 2-3.]  
 2 Simply put, Ms. Cashman has not pled sufficient facts supporting a deprivation of a federal  
 3 constitutional or legal right, privilege or immunity, a prerequisite to maintaining a Section 1983  
 4 claim. *Gibson v. United States* (9<sup>th</sup> Cir. 1986) 781 F.2d 1334, 1338.

5 Thus, for two reasons, the first and second causes of action against Mr. Good should be  
 6 dismissed: 1) Mr. Good is cloaked in immunity; and 2) Ms. Cashman has failed to sufficiently  
 7 allege the constitutional right Mr. Good purportedly violated.<sup>3</sup>

8 **V.**

9 **THE PLAINTIFFS' STATE LAW CLAIMS MUST BE DISMISSED**

10 As outlined above and in the Defendants' moving papers, Ms. Cashman's Section 1983  
 11 causes of action must be dismissed, leaving this Court without federal question jurisdiction over  
 12 the Defendants. Without such jurisdiction, the Plaintiffs' state law claims (negligence, false  
 13 arrest/false imprisonment, California Civil Code section 52.1 violation, and intentional infliction  
 14 of emotional distress) must similarly be dismissed based upon the lack of diversity between the  
 15 parties. *Acri v. Varian Associates, Inc.* (9<sup>th</sup> Cir. 1997) 114 F.3d 999, 1001.

16 **VI.**

17 **CONCLUSION**

18 For the foregoing reasons, the Defendants respectfully request the Court dismiss the  
 19 Plaintiffs' complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and (6), without leave  
 20 to amend.

21 DATED: August 14, 2008

22 HIGGS, FLETCHER & MACK LLP

23 By:   
 24 STEVEN J. COLOGNE, ESQ.  
 25 MICHAEL R. GIBSON, ESQ.  
 26 Attorneys for Defendants  
 27 SAN DIEGO UNIFIED  
 28 SCHOOL DISTRICT and JAMES GOOD

3 At the very minimum, Mr. Good should be dismissed from the second cause of action as that claim is only directed toward Officer Montana. [Opposition at p. 5, ll. 11-14.]